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June 14, 1996

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William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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RE: GC Docket No. 96-55 (61 FR16424)
Examination of Current Policy Concerning the Treatment of
Confidential Information Submitted to the Commission

Dear Mr. Caton:

On behalf of our law firm, we enclose an original and six (6) copies of a submission responding to the Commission's request for comments on its proposed rule dealing with the above comments.

If you have any questions, please call.

Respectfully submitted,



Bruce Aitken



Martin J. Lewin

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

SUBMISSION OF

**AITKEN IRVIN LEWIN BERLIN
VROOMAN & COHN, LLP**

to the

FEDERAL COMMUNICATIONS COMMISSION

regarding

**“Examination of Current Policy Concerning the Treatment of Confidential
Information Submitted to the Commission”**

GC Docket No. 96-55, FCC 96-109

June 14, 1996

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These comments are submitted in response to the Federal Communications Commission (Commission) Proposed Rulemaking concerning treatment of confidential information submitted to the Commission, GC Docket No. 96-55, FCC 96-109, 61FR 16424, et seq. (April 15, 1996)

At the outset, we commend the Commission for recognizing that its current system of addressing confidentiality warrants review. As a regulatory agency with the power to significantly affect private business interests, it is essential that the Commission maintain a system preserving the confidentiality of business sensitive information provided to it pursuant to the exercise of the Commission's regulatory functions. Equally important, the system must be perceived as reflecting the Commission's recognition of the sensitivity of the business confidential information it receives and Commission's commitment to ensuring that business confidential information will not be used to undermine the competitive position of companies required to provide that information.

Unfortunately, in our view, the current system falls short in these areas. By way of illustrations, we are familiar with one proceeding whose facts may be a prototype of problems which may face the Commission in the future. In a case involving James Kay, the Commission staff requested, pursuant to 47 USC §308(b), customer lists, telephone numbers and billing records-- the most sensitive information any company maintains. Kay's counsel at the time took the position that such information is more than merely proprietary; it goes to the core of any company's business and as such should automatically be deemed privileged and non-disclosurable.

Unfortunately, the current Commission rules do not appear to clearly establish absolute privilege on this information. In fact, the only information explicitly recognized in the rules as

accepted for confidential information are financial reports submitted by licensees of broadcast stations submitted pursuant to §1.611 of the Commission's regulations or by radio and television networks; applications for equipment authorizations and materials relating to such applications; certain schedules of financial reports submitted for cable television systems; and annual fee computation forms submitted for cable television systems. 47 CFR §0.457(d)(1)(i)-(iv).

Compounding the absence of any specific reference to customer lists and related information as being privileged or even generally suitable for confidential treatment is the Commission's standard for disclosure of information generally deemed confidential but not explicitly recognized as such in the Commission's regulations. As noted in the proposed rulemaking, the current regulations allow inspection of information upon "a persuasive showing as to the reasons for inspection." 47 CFR §0.457(d)(i) In effect, this provision allows Commission staff to decide after the fact and without any objective standard that material submitted in confidence, and recognized in the first instance by the Commission as confidential, will be disclosed. The combination of a vague standard and an after the fact decision making process is seriously at odds with the Commission's position that it is "sensitive to the concern that fulfillment of its regulatory responsibilities does not result in unnecessary disclosure of confidential information that places Commission regulatees at an unfair competitive disadvantage." (61 FR 16426) It is also contrary to the principle recognized by the Commission that "the 'private' interests of regulatees in ensuring their own competitive vitality generally coincide with the public interest in promoting a robust and competitive telecommunications market." (*Id.*)

The flawed nature of the current rule is again illustrated by the circumstances, such as that cited above, whose respondents wish to protest customer lists and other confidential data. Under

the Commission's confidentiality rules, they have no assurance that his most sensitive business information, the names and telephone numbers of his customers, would be protected from disclosure to his business competitors. In fact, in the Kay case, his attorneys twice requested that the documents he submit remain confidential because disclosure of this information would result in severe competitive harm. When these requests were denied by the Commission's staff, Kay was placed in the untenable position of risking his business or declining to respond to the staff's request. Upon advice of counsel, Kay chose the latter course. Ultimately as a result of the contentiousness which followed, the Commission staff instituted revocation proceedings.

A regulatee, such as Kay, or any other similarly situated company, should never be confronted with the Hobson choice of having privileged information it provides the Commission disclosed at some later date on the basis of a "persuasive showing," or facing revocation proceedings for non-responsiveness to staff information requests. Unfortunately, the current regulations place Kay and others similarly situated in precisely this posture.

We urge that the Commission adopt a model confidential treatment system as on the system used at a model before the US Commerce Department in its anti-dumping and countervailing duty investigations, pursuant to 19 CFR §353.4(b). The Commerce Department provides a enumerated listing of the types of factual information to be proprietary upon the designation of the submitter, including, inter alia, business or trade secrets; production costs; distribution costs; terms of sale not offered to the public; individual sale prices; the names of particular customers, distributors or suppliers, the names of particular persons from whom proprietary information was obtained; and any other specific business information the release of which would cause substantial harm to the competitive position of the submitter.

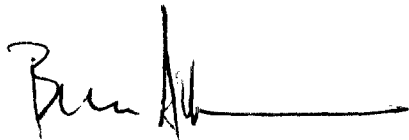
Pursuant to 19 CFR §353.32(e), the Commerce Department will normally decide whether

§353.32(g), if a request is denied, the Department will notify the submitter and will return the information to the submitter unless the submitter agrees that the information be considered public.

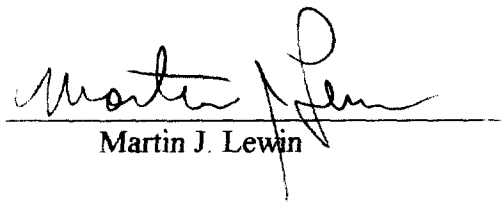
The advantages of the Commerce Department system relating to confidential information are (a) that information designated by the submitter as proprietary will be deemed as such unless the Department determines otherwise; (b) that a decision regarding proprietary treatment normally will be made within two weeks of its submission, (c) that the information will not be disclosed during the pendency of the decision; and (d) that when the Department has made a formal decision that the information submitted is not proprietary, the submitter can decide whether to disclose the information or face the consequences before the Department of non-disclosure.

We believe this system affords submitting of information the necessary safeguards and assurances regarding treatment of information they deem proprietary and recommend the Commission promulgate rules providing comparable safeguards and assurances to those submitting information to the Commission.

Respectfully submitted,



Bruce Aitken



Martin J. Lewin